IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff, v. RICHARD NICHOLSON, ETTA NICHOLSON, and KEITH NICHOLSON, Defendants.	Civil Action No.97-CV-3309

Gawthrop, J. July , 1998

M E M O R A N D U M

Before the court is the Motion to Dismiss of pro se defendants. For the reasons discussed below, defendants' motion is denied.

Background

On November 13, 1995, the Internal Revenue Service ("IRS") made an income tax assessment against Richard and Etta Nicholson, husband and wife, totaling $1,244,166.26 for the years 1988, 1989, and 1990 -- $52,122.44, $280,630.67, and $911,413.15 respectively, plus interest and penalties. To date, the Nicholsons have not paid the amount assessed against them.

The government filed this action to reduce the outstanding tax assessment to judgment. In addition, the government seeks to recover the proceeds from a conveyance of property in Bethlehem, Pennsylvania, which it alleges was fraudulent and for the sole purpose of impeding, delaying, and defeating the rights of the United States as creditors of Richard and Etta Nicholson. The

Nicholsons purchased the Bethlehem property, 7045 Raders Lane, on September 20, 1989, for $275,000. On October 19, 1993, they sold it to their son, Keith Nicholson, for $100,000, at which time the government alleges the Nicholsons knew of the $1,244,166.26 assessment against them. The Nicholsons continued to reside at the property until March 14, 1997, when Keith sold it to Timothy and Paige Maykut for $190,000. The government has brought suit against Keith Nicholson to recover that amount and to obtain judgment that the conveyance to Keith was fraudulent.

Defendants move to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and (6), based on the IRS's failure to follow its internal guidelines for instituting suit for the collection of taxes. Keith Nicholson also claims that the IRS cannot state a claim against him since it never completed a valid transferee tax assessment. Finally, Etta Nicholson moves for dismissal under Fed. R. Civ. P. 12(b)(2) alleging that this court lacks personal jurisdiction over her.[1] I shall address each of these arguments in turn.

Discussion

A. Administrative Procedures

The defendants assert that this court lacks subject matter

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[1] In their initial motion, the defendants stated that Keith Nicholson was also moving to dismiss under Fed. R. Civ. P. 12(b)(4), for insufficient process. Because in both their initial motion and their subsequent reply to the government's response, they did not provide any factual or legal support for this motion, I find it devoid of merit and I shall not address it here.

jurisdiction over these claims because the government failed to obtain the requisite authorization to commence suit, as required by 26 U.S.C. § 7401, and failed to follow its own internal procedures for "suit letters," as set forth in the Internal Revenue Service Manual ("IRM").

26 U.S.C. § 7401 provides that:

> No civil action for the collection of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Secretary authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced.

Thus, a section 7401 action requires authorization from two sources: (1) the Secretary of the Treasury/Internal Revenue Service, and (2) the Attorney General -- each of which is a condition precedent to jurisdiction in federal court. Because the government has produced only a declaration from Edward J. Snyder, Chief of the Civil Trial Section of the Department of Justice Tax Division, stating that he received and approved a request to institute suit from the IRS's Chief Counsel, defendants argue that this court lacks subject matter jurisdiction.

A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction can take two forms: it can attack a complaint on its face, known as a "facial attack," or it can attack the existence of subject matter jurisdiction, commonly referred to as a "factual attack." See Mortensen v. First Fed. Sav. and Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). Defendants' motion is a

factual attack because it challenges this court's subject matter jurisdiction over this action. The United States Court of Appeals for the Third Circuit, in Mortensen, concluded that:

> [b]ecause at issue in a factual 12(b)(1) motion is the trial court's jurisdiction -- its very power to hear the case -- there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.

Mortensen, 549 F.2d at 891. The burden of proving jurisdiction lies with the plaintiff. Young v. Francis, 820 F. Supp. 940, 943 (E.D. Pa. 1993).

I find that the Chief Counsel's request to institute suit against the Nicholsons, which, according to Mr. Snyder's sworn affidavit, was received and approved by Mr. Snyder, fulfills the requirements of § 7401. Under § 7701 of the Internal Revenue Code, the term "Secretary" is defined as "the Secretary of the Treasury or his delegate," 26 U.S.C. § 7701(a)(11)(B), and the term "delegate," when used with reference to the Secretary, includes "any officer, employee, or agency of the Treasury Department." 26 U.S.C. § 7701(a)(12)(A). Here, the Secretary's delegate was the Chief Counsel. Attached to the government's response is Department of Justice, Tax Division, Directive No. 103, dated February 17, 1994. That document states, in part, that "[t]he Chiefs of the Civil Trial Divisions . . . may, when

within their respective areas of responsibility, approve and direct the institution of civil actions and proceedings." Accordingly, Mr. Snyder, a delegate of the Attorney General, properly directed that the action against the Nicholsons commence. The government has established that this lawsuit has been properly authorized by both the Secretary of the Treasury/Internal Revenue Service and the Attorney General, as required by 26 U.S.C. § 7401. Thus, the government has shown that it fulfilled conditions precedent to this court's jurisdiction.

Defendants submitted with their motion to dismiss provisions of the IRM, which state that prior to bringing the type of suit here alleged, the Chief Counsel of the IRS is directed to send a letter to the Department of Justice that:

> b) [S]et[s] forth all relevant facts and precise legal arguments that the Department of Justice will translate into a litigation vehicle;
> c) [A]nticipate[s] to some extent the legal defenses to the Internal Revenue Service position and include[s] a reply to such defense in [the] letter; and
> d) Clearly state[s] the action the Department of Justice is being requested to take.

Internal Revenue Service Manual, Part XXXIV, Chapter (34)700 § (34)730. Because the government has not shown compliance with these guidelines, defendants argue that they have been denied due process. I treat the defendants' challenge to the IRS's failure to follow its internal guidelines as one for failure to state a claim under Rule 12(b)(6). Under Fed. R. Civ. P. 12(b)(6), a

court should dismiss a complaint only if it finds that the plaintiff cannot prove any set of facts, consistent with the complaint, which would entitle the plaintiff to relief. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). In making this determination, the court must accept as true all allegations made in the complaint and all reasonable inferences that may be drawn from those allegations. Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). The court must view these facts and inferences in the light most favorable to the plaintiff. Id. The court may draw these facts and inferences from the complaint, exhibits attached to the complaint, matters of public record, and undisputedly authentic documents if the plaintiff's claims are based upon those documents. Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993), cert. denied, 510 U.S. 1042 (1994).

It is well established that "liberty" interests entitled to protection under the Fourteenth Amendment may be created by administrative regulations. Winsett v. McGinnes, 617 F.2d 996 (3d Cir. 1980). "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more vigorous than otherwise would be required." Morton v. Ruiz, 415 U.S. 199, 235 (1974). However, violation of agency rules is not per se infringement of due process unless the regulations themselves are constitutionally mandated. United States v. Caceres, 440 U.S. 741, 749 (1979).

The Third Circuit has applied this principle and in Lojeski v. Boandl, 788 F.2d 196 (3d Cir. 1986), held that the failure to obtain approval of IRS Regional Counsel before filing notice of liens and levies, as was required by the IRS Manual, was not a violation of plaintiff's procedural due process rights. Specifically, the court stated that "[t]his is not '. . . a case in which the Due Process Clause is implicated because an individual has reasonably relied on agency regulations promulgated for his guidance or benefit and has suffered substantially because of their violation by the agency.'" Id. at 198 (quoting Caceres, 440 U.S. 741, 752-53 (1979)). Similarly, I find here that defendants could not have relied upon the production of a letter as described in IRM § (34)730. In fact, based on the nature of the suggested content, those letters appear to serve as internal work product, outlining the bases and strategies of proposed cases, which are clearly not meant to be seen by potential defendants. Thus, the IRS's failure to issue the detailed letter does not prevent its claim against the Nicholsons from going forward.

I further find that, accepting all allegations in the complaint as true, the government has set forth a set of facts that would entitle it to relief. Accordingly, defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(6) is denied.

B. Transferee Liability

Keith Nicholson moves individually for dismissal under 12(b)(6) and argues that he cannot be held liable as a transferee

of his parents' property because the IRS failed to complete a valid transferee tax assessment against him pursuant to 26 U.S.C. § 6901. Section 6901(a) provides a summary administrative procedure for the collection of an existing tax liability from transferees of the taxpayer's property.[2]

However, that the government cannot proceed against Keith Nicholson under § 6901 because it did not issue a transferee assessment does not bar the government from recouping the value of the property that was allegedly fraudulently transferred.[3] Section 6901 is not an exclusive remedy for the government. See United States v. Geniviva, 16 F.3d 522 (3d Cir. 1994)(holding that § 6901 assessment is not a prerequisite to an action against transferees of estate property under 26 U.S.C. § 6324); see also

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[2] 26 U.S.C. § 6901(a), which is intended to prevent taxpayers from avoiding payment of taxes through transfer of assets that the IRS could otherwise attach to satisfy tax deficiencies, provides in relevant part:

> (a) Method of Collection. The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, paid and collected in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred:
>
> (1) Income, Estate, and Gift Taxes.
>
> (A) Transferees. The liability, at law or in equity, of a transferee of property -
> (I) of a taxpayer in the case of a tax imposed by subtitle A (relating to income taxes).

[3] In its brief, the government acknowledges that "no transferee assessment has been made." Pl. Br. at 5, n.3.

United States v. Russell, 461 F.2d 605 (10th Cir. 1972)("[T]he collection of procedures contained in § 6901 are not exclusive and mandatory, but are cumulative and alternative to the other methods of tax collection recognized and used prior to the enactment of § 6901 and its statutory predecessors."). In addition to seeking relief under § 6901, "the United States as a creditor has the right, like any other creditor, to bring an action either to enforce a lien under 26 U.S.C. § 7403 or against the transferee of a taxpayer for a fraudulent conveyance." United States v. Pernna, 877 F. Supp. 215, 217 (D.N.J. 1994) (citing United States v. Rodgers, 461 U.S. 677, 682 (1983)).

Here, the government acknowledges that it is not proceeding against Keith under § 6901, see Pl. Br. at 5, but rather, has alleged that the conveyance of the property to him violated §§ 354, 357, and 359 of Pennsylvania's Uniform Fraudulent Conveyances Act, a statute that, as noted by defendants, has been repealed. The effective date of the Act's repeal was February 3, 1994.[4] The conveyance of property from Richard and Etta Nicholson to Keith Nicholson took place on October 19, 1993. Thus, the Uniform Fraudulent Conveyances Act applies and forms an appropriate basis for a claim against Keith Nicholson.

Keith Nicholson also states that "the Plaintiff has failed

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[4] The Pennsylvania Uniform Fraudulent Conveyance Act, the Act of May 21, 1921, P.L. 1045, No. 379 (repealed), formerly at 39 Pa.C.S.A. §§ 351-363, was replaced by the Pennsylvania Uniform Fraudulent Transfer Act, see 12 Pa. C.S.A. §§ 5101-5110, which is applicable only to transfers made after its effective date of February 1, 1994.

to join in this case the property owner and holder of the title, Timothy J. and Paige E. Maykut." Defs. Br. at 6. Federal Rule of Civil Procedure 19 describes the two circumstances under which persons must be joined as a party to an action.[5] Timothy and Paige Maykut, the current owners of the property, meet neither of these conditions. The government seeks the proceeds of the sale of the property to the Maykuts, not interest in the property itself. There is no claim against the property or the present owners. Thus, the Maykuts' joinder is not required.

C. Personal Jurisdiction

Etta Nicholson, now a resident of Virginia, moves for dismissal based on this court's lack of personal jurisdiction and states that "as [Richard Nicholson's] housewife, the Internal

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[5] A person who is subject to process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those not already parties, or (2) the person claims an interest relation to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reasons of the claimed interest.

Fed. R. Civ. P. 19 (a).

Revenue Service has gained no administrative jurisdiction attaching to her personally." Defs.' Br. at 1. The government argues that this court has jurisdiction over Etta Nicholson because the joint income against which the tax assessment was made was earned by Richard and Etta Nicholson, while they resided in Pennsylvania and because the property, which was allegedly fraudulently conveyed to Keith Nicholson, is situated in Pennsylvania.

When a defendant raises a jurisdictional defense in a Fed. R. Civ. P. 12(b)(2) motion to dismiss, the plaintiff bears the burden of demonstrating that the defendant possesses sufficient contacts with the forum state for in personam jurisdiction. See Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 63 (3d Cir. 1984). The plaintiff "meets this burden and presents a prima facie case for the exercise of personal jurisdiction by 'establishing with reasonable particularity sufficient contacts between the defendant and the forum state.'" Mellon Bank (East) PSFS Nat'l Ass'n v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992) (quoting Provident Nat'l Bank v. California Fed. Sav. & Loan Ass'n, 819 F.2d 434 (3d Cir. 1987)). The plaintiff may not rest on the bare pleadings, but rather must establish these jurisdictional facts by sworn affidavit, depositions, or other competent evidence. Time Share, 735 F.2d at 66-67 n.9.

Under Fed. R. Civ. P. 4(e), this court has jurisdiction over non-resident defendants to the extent permitted by Pennsylvania law, specifically, its long-arm statute. See 42 Pa. C.S.A. §

5322(b). That provision provides that jurisdiction arises when a person transacts any business in the Commonwealth, including, "[t]he ownership, use or possession of any real property situated within this Commonwealth." Pennsylvania courts have interpreted this statute as coextensive with the permissible limits of due process. See e.g., Koenig v. International Bhd. of Boilermakers Local 5, 426 A.2d 635, 640 (Pa. Super. 1980); Maleski ex rel. Taylor v. DP Realty Trust, 653 A.2d 54, 62 (Pa. Commw. 1994).

The initial question is whether the claim or cause of action arises from defendant's forum related activities or from non-forum related activities. See Reliance Steel Prod. Co. v. Watson, Ess, Marshall & Enggas, 675 F.2d 587, 588 (3d Cir. 1982). If, as here, the claim arises from the defendant's forum-related activities, the plaintiff need show only "minimum contacts" by the defendant with the forum state such that "maintenance of the suit does not offend [the] 'traditional notion of fair play and substantial justice.'" International Shoe v. Washington, 326 U.S. 310, 316 (1945).

I find that defendants have not shown that this court's exercise of personal jurisdiction over Etta Nicholson would be unreasonable. The income against which taxes have been assessed was received while Richard and Etta Nicholson resided and owned property in Pennsylvania. Accordingly, defendants' motion to dismiss Etta Nicholson under Rule 12(b)(2) will be denied.

An order follows.

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O R D E R

AND NOW, this day of July, 1998, Defendants' Motion to Dismiss is DENIED.

BY THE COURT:

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Robert S. Gawthrop, III J.